Neutral Citation Number: [2025] EWHC 97 (Admin)

Claim No: AC-2024-LDS-000159

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
PLANNING COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 22 January 2025

Before :

ROBERT PALMER KC
sitting as a Deputy Judge of the High Court

- -

Between :

THE KING
on the application of

AMALGAMATED SMART METERING LIMITED

Claimant

- and -

ROTHERHAM METROPOLITAN BOROUGH COUNCIL

Defendant

- and -

PROSPECT ESTATES LIMITED

Interested Party

- -
- -

Gregory Jones KC and **Alexander Greaves** (instructed by **Squire Patton Boggs (UK) LLP**) for the **Claimant**
Killian Garvey (instructed by **Anthony Collins Solicitors LLP**) for the **Defendant**
John Barrett (instructed by **Ramsdens Solicitors LLP**) for the **Interested Party**

Hearing date: 13 November 2024

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APPROVED JUDGMENT

ROBERT PALMER KC sitting as a Deputy Judge of the High Court:

Introduction

1. On 17 July 2024, Amalgamated Smart Metering Ltd (**"the Claimant"**) filed a claim form seeking permission to apply for judicial review of the decision of Rotherham Metropolitan Borough Council (**"the Council"** or **"the Defendant"**) dated 22 February 2024 to grant outline planning permission for residential development comprising up to 120 units including details of means of access at a former bus depot at Midland Road, Masbrough, Rotherham (**"the Development Site"**). The application for planning permission had been made by Prospect Estates Ltd (**"the Interested Party"**).

2. The Claimant is a wholly owned subsidiary of Mercia Power Limited (**"Mercia Power"**), and holds a leasehold interest in, and is the operator of, a gas-fuelled, back-up electricity generation facility located on the eastern side of Union Street, Masbrough, Rotherham, South Yorkshire (**"the Facility"**). Union Street runs along the eastern boundary of the Development Site.

3. The judicial review claim form was filed substantially after the six week limit for filing a claim form provided for by CPR 54.5(5), and is acknowledged by the Claimant to have been out of time: the time limit expired on 4 April 2024, nearly three and a half months (or 15 weeks) before the claim form was filed.

4. A witness statement dated 16 July 2024 was provided on behalf of the Claimant by Graham White in support of its application for judicial review. Mr White is the Chief Executive Officer of Mercia Power Response Limited, which like the Claimant is a wholly owned subsidiary of Mercia Power, and was authorised to give evidence on the Claimant's behalf. He explains the basis of the Claimant's objection to the planning permission granted to the Interested Party, and the circumstances in which it filed an application for judicial review out of time.

5. The purpose of the Facility is to provide power during periods of shortage in generation on the network. Planning permission was granted for the Facility in April 2019. The planning permission did not impose any condition restricting its operating hours. It has been operational since December 2019. It typically operates 7 days a week, including at peak times for a few hours in the morning and the evening, responding to demand and the price of electricity. It does not typically operate throughout the night, but does operate before 7:00 AM (generally between 6:00 AM and 7:00 AM). In theory, the Claimant say, it must be available to operate at any time throughout the night in order to fulfil obligations under the Capacity Market Agreement it has with the National Grid. On 21 January 2020, planning permission was granted for the erection of five metre high acoustic fencing around the northern, eastern and southern boundaries of the facility. The fencing was intended to assist in reducing the noise impacts of the facility on neighbouring businesses, after some concerns had been raised by businesses immediately to the south.

6. The Claimant is concerned about the potential for noise disturbance to the new residential development which is the subject of the outline planning permission under challenge. It is concerned that the introduction of a large scale housing development so close to the Facility would risk its existing operations and limit the scope for the future development of the Facility. The potential for noise disturbance to the future occupiers of the residential dwellings had been noted by the Defendant's environmental health officer (**"EHO"**) in a pre-application response. The EHO had said that a noise survey would be necessary to assess the potential impact of noise on the residential development, including from the facility amongst other sites, as well as any necessary mitigation measures to achieve acceptable noise levels. A noise impact assessment was duly included in support of the planning application made by the Interested Party. That led to the inclusion in the planning permission of a condition requiring appropriate mitigation measures, including the installation of appropriate glazing, ventilation and acoustic barriers. That was judged by the EHO as being sufficient to ensure that internal and ambient noise levels and design criteria for external noise could be achieved. In view of that, the EHO raised no objection to the scheme.

7. The Claimant contends that the noise impact assessment submitted in support of the application was deficient. It is concerned that the mitigation measures identified will not be enough to provide an acceptable level of noise for future residents of the development. It is ultimately concerned that in due course it will be required to scale back or cease its operations so as to avoid causing a nuisance to the residents of the development, once it is built and occupied.

8. For that reason, the Claimant states that it was very concerned to discover the existence of the planning permission on 11 June 2024. I will return later to the circumstances in which the Claimant made that discovery, and why it says that it could not have discovered its existence at an earlier time.

9. Acknowledging that a judicial review was long out of time, the Claimant made an application for an extension of time to file the claim under CPR 3.1(2)(a). The application for an extension of time was set out in Section 9.1 of the Planning Court judicial review claim form (N461PC). It was addressed in the Claimant's Statement of Facts and Grounds, and supported by witness evidence. The Claimant says that this was not through any lack of diligence on its own part, but by reason of (i) the Council's failure to carry out a lawful consultation exercise, and (ii) an error in the Council's planning software which meant that neither the application nor (once granted) the outline planning permission was visible on the Defendant's website when employees of the Claimant searched for the application.

10. On 18 July 2024, the claim form was served on both the Defendant and the Interested Party. This was well within the period of 7 days after the date of issue, as required by CPR 54.7, being only one day after the claim form had been issued.

11. On 8 August 2024, each of the Defendant and the Interested Party filed an Acknowledgement of Service (N462) (**"AoS"**). Neither attached Summary Grounds of Defence. Instead, they both stated on their AoS forms that they intended to dispute the Court's jurisdiction to try the claim pursuant to CPR Part 11, and that they wanted the Court to make an order declaring that the Court has no jurisdiction, or would not exercise its jurisdiction, in respect of the claim. In each case, the AoS was accompanied by an Application Notice (N244) seeking such an order (**"the Part 11 Applications"**). In each case, the application relied heavily on the Court of Appeal's decision in *Good Law Project Ltd v Secretary of State for Health and Social Care* [2022] 1 WLR 2339; [2022] EWCA Civ 355 (**"*Good Law Project*"**). The applications were each accompanied by written submissions in support, within which each of the Defendant and the Interested Party submitted that the Claimant's application for an extension of time should be refused, and that the Court should declare that it had no jurisdiction to hear the claim or else decline to exercise any such jurisdiction. Neither addressed the question of whether the Claimant's grounds of challenge were arguable; instead, each requested that in the event that the Claimant's extension of time application was granted and the CPR Part 11 Applications were refused, they should be granted an extension of time for service of their Summary Grounds of Defence.

12. On 14 August 2024, the Claimant filed a Reply and Response to the Part 11 applications. It described the Part 11 Applications as misconceived: they erroneously conflated an application to extend time to file a claim form with an application to extend time for service of a claim form. There was no basis to contend that the court had no jurisdiction to consider granting an extension of time to file the claim.

13. On 6 September 2024, the matter came before HHJ Belcher sitting as a Judge of the High Court for consideration on the papers. She expressed considerable doubt as to whether the procedure adopted in reliance on CPR Part 11 was appropriate in a case where the claim form had been issued late but had not thereafter been served out of time. However, she recognised that issues had been raised as to the interplay between CPR Parts 10, 11 and 54 which had not previously been determined and which were not suitable for determination on the papers. She therefore ordered that the Part 11 Applications and, if the court dismissed those applications, the applications for an extension of time for service of Summary Grounds of Defence, should be listed for hearing for full argument.

14. Among the matters identified by HHJ Belcher which gave rise to doubt as to whether the Part 11 procedure was applicable was that all parties had referred in their submissions to case law – in particular, *R (Thornton Hill Hotel) v Thornton Holdings Ltd* [2019] PTSR 1794; [2019] EWCA Civ 737 (**"*Thornton Hill Hotel*"**) – to the effect that in considering whether to extend time, the court must consider all the circumstances of the case, weighing in the balance the need for finality of decisions, prejudice to the developer, and detriment to good administration resulting from letting a public wrong go unremedied if relief is

refused. She noted that delay by the Claimant is plainly relevant and in some cases will be determinative. She observed that by adopting the Part 11 procedure, the Court was deprived of the full summary grounds (as the Defendant and the Interested Party had not engaged with the substantive issues), which placed the Court in difficulty in assessing all the circumstances of the case. She observed that it was arguable that this supported the conclusion that Part 11 did not apply in the present context.

15. Apparently prompted by that observation, on 23 and 24 October 2024 respectively the Defendant and Interested Party each filed a further application notice attaching Summary Grounds of Defence, seeking an order extending the time limit to file them. Those Summary Grounds did now engage with the Claimant's grounds of challenge in the ordinary way; they also maintained their position under Part 11, and argued that time should not be extended for the filing of the claim and that permission to apply for judicial review should be refused in any event. The Claimant objects to these applications, maintaining that it is far too late now for the Defendant and Interested Party to file Summary Grounds which ought to have accompanied their AoS. Instead, it contends that permission to apply for judicial review should now be granted.

16. The issues for my determination are therefore:

    i) Should the Court make an order pursuant to CPR 11(1) declaring that it has no jurisdiction or should not exercise any jurisdiction which it may have?

    ii) If not:

        a) Should the Court grant permission to the Defendant and to the Interested Party to rely on their Summary Grounds of Defence?

        b) Should the Court extend time for the Claimant to file the claim?

        c) Should permission to apply for judicial review be granted?

The CPR Part 11 Applications

Submissions

17. Mr Killian Garvey for the Defendant and Mr John Barrett for the Interested Party each submitted that the claim had been brought out of time. The Court ought to follow the approach applied by the Court of Appeal in *Good Law Project*, and apply by analogy the very strict requirements of CPR 7.6(3), whose principles (it was said that the Court of Appeal had held) should be followed on an application to extend under CPR 3.1(2)(a). Thus time for compliance should be extended only if the Claimant had taken all reasonable steps to comply with the relevant time limit and had acted promptly in making the application. It was submitted that the Claimant could not satisfy that test. The application for an extension of time should be refused without further consideration of the merits

(as in *Good Law Project*). The Court should then declare that it did not have jurisdiction or would not exercise such jurisdiction as it may have to try the claim, pursuant to CPR Part 11.

18. Mr Gregory Jones KC leading Mr Alexander Greaves for the Claimant, submitted that:

i) The Part 11 procedure is not available under an application for judicial review. It is available only when an acknowledgement of service has been filed under Part 10 and not Part 54. Further, the procedural approach that the Defendant and Interested Party had adopted circumvented, and was in breach of, the clear requirement in CPR 54.8(4)(a)(i) to provide summary grounds of defence with their AoS. By failing to provide full summary grounds of defence, the court had been deprived of the opportunity to consider the strength of the case. Such an approach introduced additional steps and delay into the bespoke judicial review procedure under Part 54: if the Part 11 applications were unsuccessful, on the Defendant's and Interested Party's approach, it would then be necessary to file summary grounds of defence late, with the result that the permission question would not be considered until many months after the claim had been filed. All of this delay could be avoided if they had filed summary grounds of defence with their acknowledgement of service, when they could (if so advised) have submitted that the delay in filing the claim provided a complete answer to the claim. The court could then consider whether to grant or refuse permission to apply for judicial review on a fully informed basis, and in accordance with the approach set out in *Thornton Hill Hotel.* Although summary grounds of defence had now belatedly been filed, they were well out of time, and permission to file them should be refused.

ii) In any event, it was well-established that the court does have jurisdiction to hear a claim for judicial review that has been brought out of time: *Thornton Hill Hotel* at [19]. The decision on whether to extend time must be made having regard to all the circumstances, which include the strength of the case (*Thornton Hall* at [21(4)]). There was no conflict between *Thornton Hill Hotel* and *Good Law Project:* the latter was not concerned with the issue of delay in filing a judicial review claim form. By contrast, *Good Law Project* could be clearly distinguished on the basis that it was dealing with late service of a claim form. No authority had been cited by either the Defendant or Interested Party in which the court had made an order that it did not have jurisdiction because of delay in filing the claim for judicial review.

19. Mr Garvey accepted that although the Claimant had filed the claim out of time, it was subsequently served within the time limit provided by CPR 54.7. He maintained that the principles set out in both *Thornton Hall Hotel* and *Good Law Project* remained relevant "*in demonstrating how the Court has exercised its discretion in respect to delays with judicial review*." In particular, he

submitted that *Good Law Project* was authority for the proposition that it was inappropriate to engage with the merits of a case where the issue of lateness was being considered.

20. Mr Barrett acknowledged that this approach conflicted with that laid down by the Court of Appeal in *Thornton Hall Hotel*, as it seeks to treat the question of delay in isolation, without examination of the grounds of claim or evidence in support (or other material circumstances). He argued that there was a conflict of judicial authority on this point, as the Court of Appeal had held in *Good Law Project* that it was not possible or appropriate to take any view on the merits in the context of an application under CPR Part 11. He suggested that a party was entitled to ask the court to decide the issue without consideration of the merits, as it would save the time and cost of responding to the merits of the arguments (including, in the present case, the time and cost of engaging with the expert evidence from Mott Macdonald that the Claimant sought to adduce). The key rationale for the imposition of the time limit was the prospect of harm to good administration and prejudice; the strength or otherwise of the Claimant's case did not bear on those issues.

Discussion

21. CPR Part 11 provides a procedure for disputing the court's jurisdiction. So far as is material for present purposes, it provides as follows:

> "11—(1) A defendant who wishes to—
>
> (a) dispute the court's jurisdiction to try the claim; or
>
> (b) argue that the court should not exercise its jurisdiction,
>
> may apply to the court for an order declaring that it has no such jurisdiction or should not exercise any jurisdiction which it may have.
>
> (2) A defendant who wishes to make such an application must first file an acknowledgment of service in accordance with Part 10.
>
> (3) A defendant who files an acknowledgment of service does not, by doing so, lose any right that he may have to dispute the court's jurisdiction.
>
> (4) An application under this rule must—
>
> (a) be made within 14 days after filing an acknowledgment of service; and
>
> (b) be supported by evidence.
>
> …

> (6) An order containing a declaration that the court has no jurisdiction or will not exercise its jurisdiction may also make further provision including –
>
> (a) setting aside the claim form;
>
> (b) setting aside service of the claim form;
>
> (c) discharging any order made before the claim was commenced or before the claim form was served; and
>
> (d) staying the proceedings.
>
> …
>
> (9) If a defendant makes an application under this rule, he must file and serve his written evidence in support with the application notice, but he need not before the hearing of the application file—
>
> (a) in a Part 7 claim, a defence; or
>
> (b) in a Part 8 claim, any other written evidence."

22. There is nothing in CPR Part 54 which excludes the operation of Part 11 in the context of a judicial review claim. Part 54 does not operate as a completely self-contained procedural code. To the contrary, CPR 54.1(e) defines "*the judicial review procedure"* to mean "*the Part 8 procedure as modified by this Section* [i.e. Section I of Part 54]". (CPR 8.1(1) defines "*the Part 8 procedure*" to be "*the procedure set out in this Part* [8].) CPR 54.1 adds by way of explanation a note recalling that "*Rule 8.1(6) provides that a rule or practice direction may, in relation to a specified type of proceedings, disapply or modify any of the rules set out in Part 8 as they apply to those proceedings."* Save as disapplied or modified, therefore, such rules as apply to a Part 8 claim continue to apply in the case of a judicial review claim under Section I of Part 54. Those rules include Part 11.

23. The position is the same under Section II of Part 54, which applies to Planning Court claims. CPR 54.23 expressly provides that "*These Rules and their practice directions will apply to Planning Court claims unless this section* [i.e. Section II of Part 54] *or a practice direction provides otherwise.*" Practice Direction 54D makes further provision about Planning Court claims, in particular about the timescales for determining such claims: see CPR 54.24. However, the further modifications it makes to the Part 8 procedure primarily relate to that which is applicable in claims for planning statutory review, applications under any enactment to quash certain orders or schemes etc, and statutory appeals. In the case of judicial review of the grant of planning permission, it makes no further modification to the judicial review procedure, save in respect of target timescales for the hearing of claims categorised as "significant" by the Planning Liaison Judge. Save to that extent, the procedure

is the same as the judicial review procedure provided for under Section I of Part 54.

24. One of the most significant modifications to the Part 8 procedure made by CPR Part 54 is the provision made by CPR 54.4 to the effect that the court's permission to proceed is required in a claim for judicial review. This requirement has express statutory underpinning in the form of section 31(3) of the Senior Courts Act 1981, which provides that "*No application for judicial review shall be made unless the leave of the High Court has been obtained in accordance with rules of court*".

25. By virtue of the requirement for the court's permission in every judicial review claim, the court is able to act as its own gatekeeper as to the exercise of its own jurisdiction, without (in general) there being any need for a party to make an application under CPR Part 11. A classic example is where there is an adequate alternative remedy available to the claimant. Since judicial review is a remedy of last resort, the court will generally decline to exercise its jurisdiction in such a case by refusing permission to apply for judicial review: *R (Ramage) v Newcastle upon Tyne Hospitals NHS Foundation Trust* [2023] EWHC 974 at [17].

26. A defendant or interested party who considers that permission should be refused for such a reason has the opportunity to put those matters which it considers justify the refusal of permission before the court when it files its acknowledgement of service: CPR r.54.8(1) provides that any person served with the claim form who wishes to take part in the judicial review must file an acknowledgment of service in the approved form in accordance with the following provisions of that rule. Those provisions include CPR r.54.8(4)(a)(i), which requires that "*The acknowledgement of service must, where the person filing it intends to contest the claim, set out a summary of his grounds for doing so.*" These are often referred to as "summary grounds of defence".

27. Where a defendant does contest the claim, the summary grounds of defence should set out the legal basis of the defendant's response to the claimant's case and any relevant facts (including any material matters of factual dispute). They should provide a brief summary of the reasoning underlying the decision or conduct challenged, or reasons why the application for permission can be determined without that information: CPR 54A PD para 6.2. The purpose of the Acknowledgment of Service (and in particular the summary grounds of defence) is to assist the Court in deciding whether permission to apply for judicial review should be granted and, if so, on what terms: Administrative Court Guide 2024, paragraph 8.3.5.

28. The judge will refuse permission to apply for judicial review unless satisfied that there is an arguable ground for judicial review which has a realistic prospect of success. However, even if a claim is arguable:

i) there are some circumstances where the court must refuse permission to apply for judicial review, such as where the claimant lacks sufficient interest in the matter to which the application relates (see section 31(3) of the Senior Courts Act 1981), or where it appears to the court to be highly likely that the outcome for the applicant would not have been substantially different if the conduct complained of had not occurred and there are no reasons of exceptional public interest for granting leave in any event (see section 31(3C)-(3F) of the Senior Courts Act 1981).

ii) there are other circumstances where the court may refuse permission to apply for judicial review, such as where the claim is or has become academic, or (as I have already said) there is an adequate alternative remedy: see the Administrative Court Guide 2024 at paragraphs 6.3.3 and 6.3.4.

29. It is therefore always open to a defendant responding to a claim for judicial review on their acknowledgement of service to identify anything which it considers amounts to a knockout blow to the claim, without necessarily providing a response to the grounds themselves. It may choose not to dispute that the grounds of claim are arguable, but to contest the claim by reference to another complete answer to the claim, such as the claimant's lack of sufficient interest in the matter, or the availability of an adequate alternative remedy.

30. Most pertinently for present purposes, a further common reason why the court may refuse permission to apply for judicial review, notwithstanding that the grounds may be arguable, is if the Court considers that there has been undue delay in bringing the claim. Section 31(6)-(7) of the Senior Courts Act 1981 provide:

> *"(6) Where the High Court considers that there has been undue delay in making an application for judicial review, the court may refuse to grant—*
>
> *(a) leave for the making of the application; or*
>
> *(b) any relief sought on the application,*
>
> *if it considers that the granting of the relief sought would be likely to cause substantial hardship to, or substantially prejudice the rights of, any person or would be detrimental to good administration.*
>
> *(7) Subsection (6) is without prejudice to any enactment or rule of court which has the effect of limiting the time within which an application for judicial review may be made."*

31. In the case of a planning judicial review, there is a specific rule of court which limits the time within which an application for judicial review may be made. CPR r.54.5(5) requires that "*Where an application for judicial review relates to*

a decision made by the Secretary of State or a local planning authority under the planning acts, the claim form must be filed not later than six weeks after the grounds to make the claim first arose."

32. Nonetheless, in the case of a judicial review claim that rule is not absolute (unlike in the case of some statutory reviews and appeals, where the relevant legislation does not permit the period to be extended at all). CPR 3.1(2)(a) allows the Court to extend the time limit even if the time for compliance has already expired. Where the time limit has already expired, the claimant must apply for an extension of time. The application must be set out in section 9 of the Claim Form (Form N461). As the Administrative Court Guide 2024 explains at paragraph 6.4.4.1, the application for an extension of time will be considered by the judge at the same time as deciding whether to grant permission to apply for judicial review.

33. In considering whether to refuse permission by reason that it is out of time, or alternatively whether to extend time pursuant to CPR 3.1(2)(a), the Court will apply the principles set out in *Thornton Hall Hotel* at [21]. It will be necessary to return to those principles in due course, but for present purposes it suffices to say that whether or not to extend time is a matter of judicial discretion, and that in exercising that discretion, the court will seek to strike a fair balance between the interests of the developer and the public interest. Given the interests of certainty and of avoiding detriment to principles of good administration, a claimant is expected to proceed with the "*greatest possible celerity*". What is required to satisfy the requirement of promptness will vary from case to case, and depends on all the relevant circumstances. If there is a strong case for saying that the permission was ultra vires, the court might in the circumstances be willing to grant permission to proceed, but given the delay, it requires a much clearer-cut case than would otherwise have been necessary. In short, therefore, the Court will have regard to the extent of the delay and the reasons for it, as well as the merits of the proposed claim (and all other relevant circumstances), in exercising its discretion.

34. It follows that there is generally no need for a defendant to apply under CPR Part 11 if it wishes the court to refuse an extension of time and to refuse permission to apply for judicial review on grounds of a claimant's delay in filing the judicial review claim. The need for a claimant to apply for an extension of time, coupled with the need to obtain the court's permission to apply for judicial review, generally provides a fully adequate procedure to allow the court to decide whether or not it should exercise its jurisdiction to determine the claim on its merits.

35. That is not to say that there can never be a place for an application under CPR Part 11 in the judicial review context. In *Shah v Immigration Appeal Tribunal* [2004] EWCA Civ 1665, at [9], Sedley LJ observed that Part 11 may apply to the taking of jurisdictional points in judicial review proceedings. In that case, the issue was whether the proceedings ought to have been started in the Scottish courts rather than in the courts of England and Wales, given that the decision

under challenge was that of the refusal by the Immigration Appeal Tribunal to grant permission to appeal against a decision of an immigration adjudicator sitting in Glasgow. The jurisdictional challenge failed only because it had not been made in good time, as CPR 11(4)(a) requires that the application be made within 14 days of filing the acknowledgement of service. Sedley LJ expressly rejected the Secretary of State's submission that Part 11 had no bearing on the taking of jurisdictional points in public law proceedings. He explained:

> "The amendments to Part 54 introduced by Order in 2000 extended the use of acknowledgements of service — using the same name as in Part 10 — to judicial review proceedings. Rule 54.8(5) even goes to the trouble of disapplying one element of Part 10 to which, it is to be inferred, it would otherwise apply. By rule 54.8(4)(a)(i) the acknowledgement must set out a summary of the defendant's grounds for contesting the claim. I am entirely unable to discern in these provisions a special rule that public authorities are not expected today to be as prompt and as explicit as every other defendant in setting out their case. On the contrary, Parts 10, 11 and 54 of the Civil Procedure Rules seem to me to create a consistent requirement from which public law defendants (or for that matter interested parties) are not exempt."

36. Mr Jones submitted that since CPR 11 applies where a Defendant has first filed an acknowledgement of service in accordance with Part 10, CPR 11 has no application in judicial review, as an acknowledgment of service filed under Part 10 (without more) would be inadequate and a failure to comply with CPR 54.8. I do not agree: as Sedley LJ observed in *Shah*, together Parts 10, 11 and 54 create a consistent requirement that an acknowledgement of service must be filed and that any challenge to the court's jurisdiction under Part 11 be made promptly, in public law proceedings as in any other. The fact that CPR 11(2) provides that a defendant who wishes to make such an application must first file an acknowledgement of service in accordance with Part 10 does not in itself raise any conflict with Part 54:

i) CPR Part 10 sets out the rules concerning the requirement on a defendant to file an acknowledgement of service in a Part 7 claim. However, CPR 10.1(2) provides that where a claimant uses the procedure set out in Part 8, Part 10 applies subject to the modifications set out in rule 8.3.

ii) CPR 8.3 duly sets out the procedure requiring a defendant to file an acknowledgement of service in a Part 8 claim, but (as I have explained above) this procedure is in turn modified by CPR 54.8 in the case of a judicial review claim. I have already set out the relevant provisions of that rule at paragraph 26 above. (As Sedley LJ further observed, CPR 54.8(5) also makes explicit that CPR 10.3(2) does not apply; that rule provides for variations to the period for filing of the acknowledgement of service and/or a response to the particulars of claim, none of which circumstances arise in the judicial review context, as they concern service out of the jurisdiction. The significance for present purposes is

that the express disapplication of CPR 10.3(2) would not be necessary if CPR Part 10 was not engaged at all.)

iii) Although a defendant to a judicial review claim is only obliged to file an acknowledgement of service if it "*wishes to take part in the judicial review*", a defendant who does not do so may not take part in hearing to decide whether permission should be given unless the court allows him to do so: CPR 54.9(1)(a). It follows that whether a defendant wishes to contest the grant of permission to apply for judicial review on grounds of lack of jurisdiction or on any other basis, it is necessary for a defendant in any judicial review claim to file an acknowledgement of service in accordance with CPR 54.8. If and to the extent that any separate application under Part 11 is to be made, to file such an acknowledgement of service will fulfil the requirement in CPR 11(2) that a defendant who wishes to make an application under CPR 11(1) must first file an acknowledgement of service in accordance with Part 10.

37. Nonetheless, as the White Book points out at paragraph 11.1.4, whereas the appropriate form for acknowledgment of service for claims proceeding under the Pt 8 procedure is Form N210, Section C of which invites the defendant to say that he or she intends "*to dispute the court's jurisdiction*", the form for acknowledgment of service in judicial review claims is N462, which does not expressly invite a defendant to state that the court's jurisdiction is contested. Hence "*the usual, and in practice safest, course of action, is for a defendant who wishes to raise any jurisdictional issue to raise that issue in the acknowledgment of service and to invite the court to refuse permission to apply for judicial review for that reason.*" I agree that such a course will in practice be entirely appropriate, and there remains little to be gained by making a separate application under Part 11. Like HHJ Simon (sitting as a Judge of the High Court) in *R (Girgis) v Joint Committee on Intercollegiate Examinations* [2021] EWHC 2256 (Admin) at [23]-[27], I do not read Sedley LJ's remarks in *Shah* as requiring a Part 11 application to be made in circumstances where a point on jurisdiction is squarely take in the summary grounds of defence, and the court is invited to refuse permission to apply for judicial review on that basis. It may indeed be a rare case where a Part 11 application is in fact appropriate. Nonetheless, there is nothing that excludes the possibility of making such an application in an appropriate case: if such an application is considered necessary or appropriate, the acknowledge of service and summary grounds may indicate that jurisdiction is disputed, and an application under Part 11 may be made.

38. Such an application had been made by the defendant in *Good Law Project*. Although CPR Part 11 is not mentioned in that judgment, nor in the judgment at first instance of O'Farrell J (reported at [2021] EWHC 1782 (TCC)), it was the basis of the application for which the defendant in that case had made: the Secretary of State contended that there had not been valid service of the judicial review claim form in that it had been served late, and therefore applied for "*an*

order that the claim form should be set aside for want of jurisdiction". This was an application under CPR 11(1) for the specific form of relief provided for under CPR 11(6)(a). The claimant meanwhile applied for an order under CPR 6.15 permitting an alternative form of service which would render valid any late service of its claim form, alternatively for an extension of time for such service: see the judgment at first instance at [2(ii)-(iii)]. All of these applications were heard together. The claimant's applications for alternative service and/or an extension of time were refused by O'Farrell J, and the defendant's application to set aside the claim form succeeded. The application for permission to apply for judicial review was therefore not considered at all at first instance; likewise on appeal, the Court of Appeal proceeded on the basis that it was neither possible nor appropriate to take any view on the merits; the details of the claim did not matter. Carr LJ (as she then was), giving the leading judgment, said at [17] that "*The most that can be said at this stage is that the claim may be arguable. If the appeal succeeds, the question of permission will fall to be considered in the normal way under CPR 54.4.*" In the event, the Court of Appeal dismissed the claimant's appeal, so the question of permission was never considered at all. But even if the application under Part 11 had never been made, it would in my view have been equally appropriate for the defendant to have invited the court simply to refuse permission to apply for judicial review on the grounds that the claim had not been validly served, without any further consideration of the merits.

39. The setting aside of the claim form without consideration of the merits of the claim was the appropriate in the *Good Law Project* case because, unlike the question of whether time should be extended for the filing of a judicial review claim, the extension of time for late service of a judicial review claim is more tightly controlled by the rules. This is because:

i) CPR 54.7 provides that:

"*The claim form must be served on*

(a) the defendant; and

(b) unless the court otherwise directs, any person the claimant considers to be an interested party,

within 7 days after the date of issue."

ii) As Carr LJ explained at [41], "*service of a claim form can be distinguished from other procedural steps. It performs a special function: it is the act by which the defendant is subjected to the court's jurisdiction. This quality is reflected in the terms of CPR 7.6, with its very strict requirements for any retrospective extension of time. Equally, reliance on non-compliant service is not one of the instances of opportunism deprecated by the courts … . The need for particular care in effecting valid service, particularly where there are tight time limits*

and/or a claimant is operating towards the end of any relevant limitation period, is self-evident." Further, at [63]: "*service of a claim form requires the utmost diligence and care to ensure that the relevant procedural rules are properly complied with.*" And at [83]: "*It is important to emphasise (again) that valid service of a claim form is what founds the jurisdiction of the court over the defendant. Parties who fail, without good reason, to take reasonable steps to effect valid steps, in circumstances where a relevant limitation period is about to expire, expose themselves to the very real risk of losing the right to bring their claim."*

iii) CPR 7.6 makes provision for extensions of time to be granted for service of a claim form in compliance with CPR 7.5. In particular, the circumstances in which the court may grant a retrospective application for an extension of time for service of a claim form are addressed by CPR 7.6(3). It provides that "*the court may make such an order only if–*

(a) the court has failed to serve the claim form; or

(b) the claimant has taken all reasonable steps to comply with rule 7.5 but has been unable to do so; and

(c) in either case, the claimant has acted promptly in making the application."

iv) CPR 7.6 does not directly apply to the judicial review procedure. However, the Court of Appeal held that "*there is no good reason why the requirements under CPR 7.6(3) for a retrospective extension of time to serve a Part 7 or Part 8 claim form should not apply equally to a judicial review claim, and every reason why they should*": Carr LJ at [80]. Thus on an application under CPR 3.1(2)(a) for an extension of time for service of a judicial review claim form, the principles of CPR 7.6 are to be followed. So unless a claimant has taken all reasonable steps to comply with CPR 54.7 but has been unable to do so, time for service should not be extended: Carr LJ at [85]. Both Phillips LJ and Underhill LJ expressly agreed with Carr LJ on this point: see [95] and [96]. While Good Law Project Ltd was subsequently granted permission to appeal to the Supreme Court, the appeal was not ultimately pursued.

40. In my judgment, it could not be clearer that in *Good Law Project*, the Court of Appeal was considering the approach to be taken to an application under CPR 3.1(2)(a) to extend time for the service of a claim form after the time allowed by CPR 54.7. It was not considering the approach to be taken to an application under CPR 3.1(2)(a) to extend time for the filing of a claim form after the time allowed by CPR 54.5. Nothing in *Good Law Project* cast any doubt upon the approach to be taken in the latter case as explained (in the planning context) in *Thornton Hall Hotel.* To the contrary, its approach is explicitly based upon the application of CPR 7.6 to applications for an extension of time for service of a

judicial review claim form; CPR 7.6 is in turn exclusively concerned with late service of a claim form, not with applications for an extension of time for such a claim to be filed.

41. *Good Law Project* has since been applied in a variety of first instance decisions by the Planning Court. Six such cases (including *R (Merrills) v SSLUHC* [2024] EWHC 1219 (Admin), upon which the Defendant and Interested Party also relied) were reviewed by Coulson LJ in his judgment in *Secretary of State for Levelling Up, Housing and Communities v Rogers* [2024] EWCA Civ 1554 (with whom Birss LJ and the Senior President of Tribunals agreed). This judgment was handed down as recently as 11 December 2024, and was helpfully drawn to my attention by the Defendant following the hearing in the present case. However, it does not take the matter any further for present purposes. Each of the cases reviewed by Coulson LJ was an application for planning statutory review under section 288 of the Town and Country Planning Act 1990. *Rogers* itself concerned both a section 288 application and a statutory appeal under section 289. In such section 288 statutory review cases, the claim form must not only be filed but must also be served within six weeks from the date of the decision under challenge (or four weeks in the case of a section 289 statutory appeal). In each case, there had been late service of the claim, and so the *Good Law Project* principle requiring the application of the CPR 7.6(3) test was applied to the claimant's application for a retrospective extension of time for service to be effected. However, neither *Rogers* nor any of the cases reviewed by Coulson LJ (including *Merrills*) suggest that the approach to be taken to an application for an extension of time for filing a planning judicial review claim form is anything other than that set out in *Thornton Hall Hotel.*

42. The fact that *Good Law Project* has not changed the approach set out in *Thornton Hall Hotel* is vividly illustrated by the judgment of Lavender J in *R (ETM Contractors Ltd) v Bristol City Council* [2024] EWHC 2263 (Admin). In that case, the claimant wished to apply for permission to apply for judicial review of the decision of the local planning authority to grant outline planning permission to the interested party. The claimant had neither filed the judicial review claim form within the six week time limit imposed by CPR 54.5(5) nor served it on either the defendant or the interested party within seven days of the date of issue as required by CPR 54.7. The claimant applied for orders pursuant to CPR 3.1(2)(a) extending the time limit for both the filing and the service of the claim form. However, in light of the Court of Appeal's decision in *Good Law Project*, it did not contend that Lavender J should make such an order extending the time limit for serving the claim form: since the Supreme Court had granted permission to appeal in *Good Law Project*, the claimant wished to preserve its position in case the Supreme Court's judgment effected a change in the relevant law as stated by the Court of Appeal. (In fact, as I have indicated, no such appeal is pursued before the Supreme Court.) Lavender J accordingly dismissed the application insofar as it sought an order pursuant to CPR 3.1(2)(a) extending the time limit for serving the claim form: see the judgment at [4]. Lavender J went on to consider in full the claimant's application for an order

pursuant to CPR 3.1(2)(a) extending the time limit for filing the claim form, by reference to the test set out in *Thornton Hall Hotel.* It was not suggested by anyone that the test set out in CPR 7.6 and applied in *Good Law Project* to the application for an extension of time for service of the claim form could or should somehow be applied to the application for an extension of time for the filing of the claim form.

43. For these reasons, the Part 11 applications made by the Defendant and the Interested Party in the present case are in my judgment profoundly misconceived. Where, as here, there is an application for an extension of time for the claim form to be filed but there is no dispute that, following filing, the claim form was served within the relevant time limit imposed by CPR 54.7, the *Good Law Project* line of authority does not apply. Instead, such an application falls squarely within the territory of the principles outlined in *Thornton Hall Hotel.* The question of whether time should be extended for filing the claim form must be resolved by the exercise of judicial discretion in accordance with the principles there explained (which may include, among other things, a broad assessment of the merits of the claim). There is no short cut which entitles the Defendant or Interested Party to point to the delay in filing the claim form and to treat that as *ipso facto* determinative of the claim.

44. Nor is there any other basis upon which the Part 11 Applications could succeed independently of the outcome of the Claimant's application under CPR 3.1(2)(a) for an extension of time for the claim form to be filed and for permission to apply for judicial review.

45. The correct course in this case would have been for the Defendant and the Interested Party to have filed summary grounds of defence in accordance with CPR 54.8(4), within which they could each have set out their reasons for opposing the Claimant's application under CPR 3.1(2)(a), as well as any other reasons upon which they wished to rely in order to argue that permission to apply for judicial review should be refused. There was nothing to be gained from making a Part 11 application in addition to or in lieu of such a course.

46. The Part 11 Applications are accordingly dismissed.

The applications by the Defendant and the Interested Party to extend time for the filing of summary grounds of defence

47. The Defendant and Interested Party ought to have filed summary grounds of defence with their acknowledgement of service on 8 August 2024, as required by CPR 54.8(4). Having failed to do so initially, they filed applications on 23 and 24 October 2024 respectively for an order extending the time for them to file their summary grounds of defence. This was apparently prompted by the Order of HHJ Belcher listing the Part 11 Applications to be heard, while voicing doubts as to whether Part 11 applied in a judicial review context. In response, the Claimant filed submissions dated 29 October 2024 opposing the application.

48. In the event, little turns on the content of the summary grounds of defence. They contain submissions as to the availability of the Part 11 procedure, but in the alternative make submissions applying the *Thornton Hall Hotel* test (and related authorities concerning the extension of time for the filing of a judicial review claim form). These submissions were largely anticipated by the Part 11 applications themselves: the main difference is that the Part 11 Applications referred to both lines of authority without distinction, whereas the summary grounds of defence recognise for the first time that there was a substantive difference between an application for an extension of time to file a claim form and one in respect of service of the claim form.

49. Although the summary grounds addressed the Claimant's grounds for the first time, at the hearing both Mr Garvey and Mr Barrett invited me to determine the Claimant's application under CPR 3.1(2)(a) on the assumption that each of the grounds of claim are arguable.

50. In the circumstances, there is no prejudice to the Claimant arising from the late submission of the summary grounds of defence. I will extend time for them to be filed, but order that the costs of their preparation will be borne by the Defendant and Interested Party in any event.

The Claimant's application under CPR 3.1(2)(a) for an extension of time to file the judicial review claim form

51. The Claimant relied upon the following matters in support of its application under CPR r.3.1(2) to extend the six week time limit for filing the claim imposed by CPR r.54.5(5):

    i) The delay had been caused by the Council's failure to consult the Claimant, and a fault with the Council's planning software which meant that the application was not visible when its employees searched for it on the map search facility, which made it difficult for the Claimant to discover the application.

    ii) As soon as the Claimant became aware of the application, it acted with great speed to understand the implications of the decision and whether, if necessary, steps could be taken to challenge it.

    iii) The claim raises serious issues regarding the potential adverse noise impacts that will be suffered by future residents of the development, which could affect their health and quality of life.

    iv) The development had the potential to affect the operation of an existing business, located within an area identified for business uses, which makes an important contribution to the provision of energy and meeting National Grid's requirements for additional energy at times of high demand.

v) The development could also jeopardise any future plans to convert the Facility to use for battery storage, which will assist in meeting the challenges of climate change.

vi) The Development is a windfall site, and the Council concluded that there is currently no shortage of housing land to meet local needs in the borough, and no need to approve residential development on land allocated for other uses because the Council is confident that it can meet its housing requirement and housing need target.

vii) In its grounds of claim, although not pursued in oral argument, the Claimant also developed an argument to the effect that it would be inconsistent with the United Kingdom's obligations under the Aarhus Convention and with Articles 6, 14 and Article 1 of the First Protocol to the ECHR to refuse to extend time. The premise of the Aarhus Convention argument was that time should be taken to begin to run from the date when the decision became known to the public, and not from the date when the decision was taken. The premise of the ECHR argument was that the Claimant should have been individually notified of the planning application, as other neighbouring land owners/occupiers had been.

52. It appears to me to be right to determine this application now. In his skeleton argument Mr Jones expressed opposition to his application to extend time and/or his application for permission to apply for judicial review being determined at this hearing, on the ground that they had not originally been listed to be heard alongside the Part 11 Applications pursuant to the Order of HHJ Belcher. However, by the time of the hearing that position had softened into a realistic recognition that the court would wish to determine all matters together. In the event, all evidence and argument relevant to the application to extend time and the application for permission were fully ventilated at the hearing, and there was no suggestion of any prejudice to the Claimant to all matters being determined together by reason of any need to prepare any further evidence or argument.

53. On paper, Mr Jones had expressed the concern that to proceed would deprive the Claimant of the right to have two bites of the cherry on its application for permission (first on paper, and then if necessary upon renewal to a hearing), but there is no substance to that concern. In particular, there is no automatic right to have a permission application considered on two occasions: upon consideration of the papers, it is open to the judge to adjourn the application to a hearing. The only relevant right (save where the application is certified as being totally without merit pursuant to CPR 54.12(7)) is that the Claimant is entitled to have the permission application heard at a hearing. The Claimant has had the benefit of a full hearing extending to a day. At the close of the Defendant's and Interested Party's opening submissions in support of the Part 11 Applications, I indicated to Mr Jones that I did not need to hear submissions in response to those applications, but invited him to address me on his applications to extend time and for permission. He was thus able to focus his submissions on these

applications. Moreover, they proceeded on the basis of a concession by the Defendant and the Interested Party that the Claimant's grounds were arguable. I can see no benefit to deferring consideration of those applications, therefore. The only result would be to cause further delay to the resolution of this claim. By the close of the hearing, I did not understand Mr Jones to maintain any position that I should not determine these applications; to the contrary, he submitted that I should determine them both in his favour.

The Thornton Hall Hotel principles

54. The approach the court should take when considering whether a claim for judicial review of a planning permission has been issued too late was summarised by the Court of Appeal in *Thornton Hall Hotel* at [21]. The principles to be drawn from the case law were said to be as follows (citations omitted):

> "(1) When a grant of planning permission is challenged by a claim for judicial review, the importance of the claimant acting promptly is accentuated. The claimant must proceed with the "greatest possible celerity" – because a landowner is entitled to rely on a planning permission granted by a local planning authority exercising its statutory functions in the public interest. … In such cases the court will only rarely accede to an application to extend time for a very late challenge to be brought. …
>
> (2) When faced with an application to extend time for the bringing of a claim, the court will seek to strike a fair balance between the interests of the developer and the public interest … . Where third parties have had a fair opportunity to become aware of, and object to, a proposed development – as would have been so through the procedure for notification under the Town and Country Planning (Development Management Procedure) (England) Order 2010 **("the 2010 Order")** – objectors aggrieved by the grant of planning permission may reasonably be expected to move swiftly to challenge its lawfulness before the court. Landowners may be expected to be reasonably alert to proposals for development in the locality that may affect them. When "proper notice" of an application for planning permission has been given, extending time for a legal challenge to be brought "simply because an objector did not notice what was happening" would not be appropriate. To extend time in such a case "so that a legal objection could be mounted by someone who happened to remain unaware of what was going on until many months later would unfairly prejudice the interests of a developer who wishes to rely upon a planning permission which appears to have been lawfully granted for the development of his land and who has prudently waited for a period before commencing work to implement the permission to ensure that no legal challenge is likely to be forthcoming …" … . When planning permission has been granted, prompt legal

action will be required if its lawfulness is to be challenged, "unless very special reasons can be shown ...".

(3) Developers are generally entitled to rely on a grant of planning permission as valid and lawful unless a court has decided otherwise … . A developer is not generally required "to monitor the lawfulness of the steps taken by a local planning authority at each stage of its consideration of a planning application". Such an obligation is "not warranted by the legislative scheme, which places the relevant responsibilities on the local planning authority", and "it would give rise to practical difficulties if applicants were required at each stage to check on the authority's discharge of its responsibilities". Applicants for planning permission are "entitled to rely on the local planning authority to discharge the responsibilities placed upon it", and "should not be held accountable for the authority's failure to comply with relevant requirements, at least where … they cannot be said to have caused or contributed to that failure by their own conduct".

(4) What is required to satisfy the requirement of promptness "will vary from case to case", and "depends on all the relevant circumstances". If there is a "strong case for saying that the permission was *ultra vires*", the court "might in the circumstances be willing to grant permission to proceed", but "given the delay, it requires a much clearer-cut case than would otherwise have been necessary".

(5) The court will not generally exercise its discretion to extend time on the basis of legal advice that the claimant might or should have received … .

(6) Once the court has decided that an extension of time for issuing a claim is justified and has granted it, the question cannot be re-opened when the claim itself is heard. Section 31(6)(a) of the 1981 Act does not apply at that stage, because permission to apply for judicial review has already been granted … .

(7) The court's discretion under section 31(6)(b) requires an assessment of all relevant considerations, including the extent of hardship or prejudice likely to be suffered by the landowner or developer if relief is granted, compared with the hardship or prejudice to the claimant if relief is refused, and the extent of detriment to good administration if relief is granted, compared with the detriment to good administration resulting from letting a public wrong go unremedied if relief is refused … . The concept of detriment to good administration is not tightly defined, but will generally embrace the length of the delay in bringing the challenge, the effect of the impugned decision before the claim was issued, and the likely consequences of its being re-opened. Each case will turn on its own particular facts and an evaluation of all the relevant circumstances … .

> (8) It being a matter of judicial discretion, this court will not interfere with the first instance judge's decision unless it is flawed by a misdirection in law or by a failure to have regard to relevant considerations or the taking into account of considerations that are irrelevant, or the judge's conclusion is clearly wrong and beyond the scope of legitimate judgment … . It may often be difficult to separate the exercise of discretion on remedy under section 31(6) from the considerations bearing on the discretion to extend time under, for example, CPR r.3.1(2)(a) … . Care must be taken to distinguish in the authorities between cases where the court has exercised its discretion under section 31(6) and those where it has exercised its general discretion on remedy in a claim for judicial review … .

55. One of the principal authorities upon which the Court of Appeal drew – particularly for the principles at [21(2)-(3)] – was the judgment of Sales LJ (as he then was) in *R (Gerber) v Wiltshire Council* [2016] EWCA Civ 84. At [46]-[[49], Sales LJ emphasised the relationship between the publicity requirements attaching to notices of planning applications and the justification for strict observance of time limits for any challenge to a planning permission. Given the reliance placed upon his judgment by both parties, it is appropriate to set out what he said, notwithstanding the overlap with *Thornton Hill Hotel*:

> "46. The basic position regarding the need for an objector to a grant of planning permission to take speedy action to challenge such grant in the courts is not in doubt. This is clearly set out in the relevant authorities. Once planning permission is granted the owner of the land to which it relates is entitled to rely upon it and there is a substantial risk that he will begin investing effort and money to do so without waiting any lengthy period before he does. Also, planning permission will have been granted because the grantor is satisfied that it is in the overall public interest for the development to occur, without any further delay. The basic rules regarding notification of applications for planning permission set out in [the 2010 Order] are designed to afford potential objectors a fair opportunity to learn about and object to an application for planning permission before it is granted. The courts' approach in relation to an application to extend time for judicial review has to strike a fair balance between the interests of the objector, the interests of the developer and the public interest. In light of the risk of detrimental reliance by a developer on the grant of permission and possible prejudice to the public interest, it is incumbent on an objector to proceed with the "greatest possible celerity" so as to minimise the risk of prejudice to those other interests.
>
> …
>
> 48. Absent any legitimate expectation relevant to his specific case, Mr Gerber was in the same position as any member of the public so far as notification of applications for planning permission in the locality was

> concerned. The notification rules in the 2010 Order are themselves part of the legal framework designed to strike a fair balance between the competing interests of objectors and developers. If there is compliance with those rules, as in this case, potential objectors among the general public will have been given what is normally to be regarded as a fair opportunity to learn about and object to a proposed development before planning permission is granted. Landowners are expected to be reasonably observant in keeping an eye on developments in their locality which might affect them. There was no legitimate expectation for Mr Gerber in this case that might have put him off his guard as to that. Where a fair opportunity has been given to objectors to learn in good time about a proposed development in their locality via compliance with the notification rules, then in view of the possible harm to other competing interests it is reasonable to expect them to move with speed to challenge the lawfulness of the grant of planning permission for that development in the courts, if that is what they wish to do.
>
> 49. In my judgment, where proper notice of an application for planning permission has been given pursuant to the 2010 Order it is not appropriate to extend time for bringing a legal challenge to the grant of such permission simply because an objector did not notice what was happening. Extending time in such a case so that a legal objection could be mounted by someone who happened to remain unaware of what was going on until many months later would unfairly prejudice the interests of a developer who wishes to rely upon a planning permission which appears to have been lawfully granted for the development of his land and who has prudently waited for a period before commencing work to implement the permission to ensure that no legal challenge is likely to be forthcoming, as happened here. Prompt legal action after grant of a planning permission to challenge its lawfulness will be required in all cases, unless very special reasons can be shown of a kind which are wholly absent in this case. Especial speed will be expected in the case of objectors who have been involved in the planning process throughout, as emphasised by Keene LJ in *Finn-Kelcey* at [24], but it does not follow that the strong requirement of prompt action will be substantially relaxed in the case of someone who, despite a planning authority's compliance with the notification rules laid down in law, remained in ignorance."

56. In both *Gerber* and *Thornton Hall Hotel*, significant weight was placed upon the importance of the fact that a planning application would have been advertised in accordance with the 2010 Order. That Order has since been superseded by Town and Country Planning (Development Management Procedure) (England) Order 2015 (**"the 2015 Order"**). In either case, fulfilment of the relevant publicity requirements is taken to be sufficient to put a person on notice of the existence of the planning application, even if they do not in fact happen to see the application advertised. By the same token, if there was a total failure to advertise an application or make it known to the public, it could not

be said that anyone had been put on notice of the application until such time as the existence of the planning application was properly made known. Where there is only partial compliance with the publicity requirements, there are likely to be fact sensitive questions, depending on the nature and extent of the failure, as to the time by which any given objector should be taken to have been put on notice of the existence of the application. It will therefore be necessary to consider in the present case whether the requirements of the 2015 Order were fulfilled in the present case, and if not, what the consequences of that are for the Claimant's application to extend time.

57. Following the hearing, the Defendant drew my attention to the recent case of *R (Wallis) v North Northamptonshire Council* [2024] EWHC 3076 (Admin), a decision of Lang J dated 2 December 2024 in which the judge refused an application to extend time for the filing of the claim form. I allowed time for the parties to make any written submissions on this case if they wished to do so. In the event, only the Claimant made further submissions dated 11 December 2024. Without intending any discourtesy, I did not find those submissions took the matter any further: they largely proceeded by way of comparison of the facts in *Wallis* with the facts of the present case. I prefer to apply the principles directly, and have adopted that approach in what follows.

58. It follows from those authorities that I must consider the following questions in deciding whether or not to extend time for the filing of the claim form in the present case:

    i) Were the publicity requirements of the 2015 Order fulfilled?

    ii) By what time had the Claimant had a fair opportunity to become aware of, and object to, the proposed development?

    iii) Did the Claimant act promptly thereafter?

    iv) How strong is the Claimant's case for saying that the grant of outline permission was *ultra vires*?

    v) What degree of prejudice to third parties and/or detriment to good administration will be caused if time is extended for the claim form to be filed?

    vi) Are there any other relevant circumstances which should be weighed in the balance, including the other matters raised in support of the Claimant's application?

(i) Were the publicity requirements of the 2015 Order fulfilled?

59. Article 15(1) of the 2015 Order required the Defendant to publicise the application in the manner prescribed by that article. The relevant requirements of Article 15 for the present application were as follows:

> *"(4) … the application must be publicised in accordance with the requirements in paragraph (7) and by giving requisite notice –*
>
> *(a) (i) by site display in at least one place on or near the land to which the application relates for not less than 21 days ; or*
>
> *(ii) by serving the notice on any adjoining owner or occupier; and*
>
> *(b) by publication of the notice in a newspaper circulating in the locality in which the land to which the application relates is situated."*

60. The requirements in paragraph (7) referred to are that certain information "*must be published on a website maintained by the local planning authority*". That information includes, *inter alia,* the address or location of the proposed development, a description of the proposed development, and where and when the application may be inspected and representations made about it.

61. The Interested Party's application for outline planning permission was made to the Defendant on 26 September 2023. In a witness statement dated 8 August 2024 (submitted in support of the Defendant's Part 11 application), Anthony Lowe, the Defendant's Development Management Officer, has explained that in order to publicise the application, the Defendant took three steps.

i) First, it posted site notices on street lighting columns at four locations around the boundaries of the Development Site on 12 October 2023. Mr Lowe has provided photographs of the notices *in situ*, as well as a plan showing where they were posted. One of them was posted on Union Street, a short distance down the street from the Facility. The notice explained that the application could be viewed online on the Defendant's website, as well as in person at its offices.

ii) Secondly, it sent letters dated 9 October 2023 to all the surrounding addresses for which the Defendant had addresses on the Royal Mail mapping system. This system identified 67 addresses, each of which were sent a copy of the letter. The letter similarly advised that the application could be viewed online on the Defendant's website, as well as in person at its offices. However, Mr Lowe states that the Claimant's address did not appear on the Royal Mail mapping system. Mr White says that is surprising: although the Facility generally operates on an unmanned basis, it has a postal address and a post box on its front gate, and the Facility is visited 2-3 times per month, when the post box is checked. Although subsequent enquiries by the Council had confirmed that the Council's Business Rates Department did hold a correspondence address for the Claimant, the Business Rates team utilises a different address system to the Planning team; the Council did not consider that addresses from different systems could or should be shared internally consistently with its data protection obligations. The result was that no letter was sent to the Claimant at the Facility.

iii) Thirdly, details of the application were made available on the Council's website on its Planning Portal. Mr Lowe confirms that this was done on 26 September 2023. The application could be searched for either by reference to the application number (as appeared on the site notices) or by reference to its address.

62. It is also necessary to set out two ways in which the Defendant did not publicise the application.

i) The Defendant did not publish notice of the planning application in any local newspaper. Mr Lowe instead referred in his witness statement to the fact that a press article was published on the Rotherham Advertiser's website on 16 October 2023, which reported that an outline planning application for 120 homes had been made at the former Midland Road bus depot. It identified the Interested Party as being the applicant, and referred to planning objections which had already been made to it. However, this was not a statutory notice published by the Defendant itself.

ii) Alongside its Planning Portal, the Defendant also operates a Map Search facility on its website, which is designed to allow member so the public to identify historic or current applications for planning permission by reference to a map. A disclaimer prominently displayed on the front page of the Map Search facility explains that this service was provided "*for information purposes only"*, and that while the Defendant "*seeks to meet the highest standards of quality information and every attempt has been made to present up to date and accurate information",* the Defendant *"offers no warranty to its accuracy or completeness."* Mr Lowe accepts that there was a fault with the service such that the Interested Party's application did not appear on the map, at least in mid-February 2024 (which as will be explained below is when an employee of the Claimant referred to it in an effort to identify any planning application which had been made in respect of the Development Site). This fault did not affect the information on the Planning Portal itself.

63. It follows that the requirements of Article 15(4)(a) were fulfilled, in that site notices were posted in accordance with Article 15(4)(a)(i). It was not necessary for the Council also to serve the notice on adjoining owners or occupiers in accordance with Article 15(4)(a)(ii), as the two means of publicity are expressed to be alternatives to each other. The fact that the Council did serve such notice on most adjoining owners or occupiers (but not the Claimant) does not alter that position. Although local authorities may have informal schemes for discretionary notification, this does not generally give rise to any legitimate expectation of notification: see *R v Secretary of State for the Environment, ex p. Kent* (1989) 57 P.&C.R. 431. As Pill J (as he then was) held at 438, there is no general requirement or duty, as part of the requirement or duty to act fairly, to notify individually those likely to be substantially affected by planning proposals. A general, though informal, practice of notification does not create a

duty to notify. (There was no criticism of this reasoning in the Court of Appeal, where the judge's decision was upheld: [1990] J.P.L. 124.) Although it may be possible that a local authority may generate a legitimate expectation that certain persons (or classes of person) will be consulted upon any given application, such as by the adoption of a Statement of Community Involvement, there was no suggestion in the present case that any such legitimate expectation had been generated.

64. The requirements of Article 15(7) were also met, in that the required information was published on the Council's website, on its planning portal, along with electronic copies of the application documents. The fact that the additional Map Search facility did not properly display the application does not detract from that position. The Council made clear (through the prominent and unavoidable disclaimer) that this was an additional service upon which reliance should not be placed. While a convenient additional service to the legislative requirement of the online register, the Council's obligations under Article 15(7) were fully discharged by the publication of the information on the planning portal.

65. However, the requirements of Article 15(4)(b) were not fulfilled, in that the Council failed to publish the notice in a newspaper circulating in the locality in which the land to which the application relates is situated. This was not a pleaded ground of complaint, although Mr Jones told me that, if permission were granted, the claim would be amended to include such a complaint.

(ii) By what time had the Claimant had a fair opportunity to become aware of, and object to, the proposed development?

66. The Claimant's evidence is that none of its employees (or those of Mercia Power) noticed the site notices at the time they were displayed, nor any of the local press coverage in October 2023. Mr White's evidence is that the Claimant only became aware of the grant of planning permission on 11 June 2024. I set out below paragraphs 13-19 of Mr White's witness statement of 16 July 2024, which deal with the reasons why the Claimant did not discover the existence of the planning permission at an earlier stage. I do so because, as I shall further explain, I have a number of concerns about the fullness and frankness of its contents. Mr White says as follows:

> "13. On 16 February 2024 my colleague, Kevin Thompson (Operations Engineer for Mercia Power Response Limited) informed me via text message that he had heard rumours that the Development Site was to be demolished to build 150 houses. I asked Kevin Thompson to contact our colleague Peter Ford, Development and Compliance Director.
>
> 14. I also contacted my colleague Peter Ford the same day, via telephone and asked him to investigate further. I am aware that Peter Ford and Kevin Thompson also spoke via telephone and Peter Ford asked Kevin Thompson to check the Development Site for any notices regarding a

planning application. I understand that Kevin Thompson confirmed on a telephone call the same day to Peter Ford that there were no notices in the vicinity of the Development Site at that time.

15. Additionally, it is noted that Kevin Thompson and, so far as I am aware, anyone else at Mercia Power Response Limited, the Claimant and any of its sub companies had not seen any site notices regarding the proposed Development at any time, despite having employees visiting the Facility on a regular basis.

16. Kevin Thompson sent an internet link to myself and Peter Ford via email later on the 16 February 2024 which referred to the prior approval of the demolition of the Development Site ("Demolition Approval").

17. Subsequently, I understand that Peter Ford continued to check the Council's map search facility for planning applications relating to residential development on the Development Site but was unable to locate any reference to such development. Additionally, I am aware that Peter Ford also checked with commercial provider 'Searchland' to establish if they could locate any reference to residential development on the Development Site, but again, no such results were found except the Demolition Approval. On the basis that we were unable to locate any reference to the housing development on the Development Site by the usual means, had not received neighbour consultation communication from the Council in relation to a planning application at the Development Site despite being in close proximity nor seen any site notices in relation to planning applications, we came to the reasonable conclusion that no other planning applications, other than the Demolition Approval, existed.

18. I understand that Peter Ford and Kevin Thompson kept a look out for any information on the Development Site with regular reviews of the Council's map search facility and local news.

19. It was not until 11 June 2024, when Kevin Thompson found an article on the BBC news website which stated that planning permission had been granted for 120 dwellings on the Development Site and subsequently sent this to Peter Ford via email the same day, who investigated this further with the Council, that we became aware of the Development."

67. Mr White goes on to explain that following email correspondence with the Council, it acknowledged on 14 June 2014 that there had been a fault with the map search facility, in that the outline application had not been correctly captured by the planning software. The issue had been raised with the Council's IT department and had been corrected.

68. Although Mr White exhibited the texts and emails to which he had referred, copies of the document for which he was provided an "internet link" on 16 February 2024 (referred to at paragraph 16 of his witness statement)and of the BBC news article (referred to at his paragraph 19) had not been provided. I therefore asked for them to be produced at the hearing, and they were duly provided.

69. Consideration of those documents as well as of the texts and emails exhibited provides fuller context than is provided by the terms of the witness statement itself.

70. In the text message of 16 February 2024, sent at 08.59, Mr Thompson said that he had "*just heard that the old bus depot opposite our entrance at Union Street is being knocked down to build 150 houses. Thought I would let you know in case it could cause us any potential noise complaints further down the line.*" Mr Thompson did not explain where he had heard this information, but there was nothing in his text to suggest his information consisted only of "*rumours*", as Mr White suggests. To the contrary, the information provided was specific, and reflected the fact that demolition work on the site had been ongoing since summer 2023, even if it was not finally completed until June 2024.

71. Mr White responded to the text message at 11:39: "*Thanks for letting me know. Can you call Peter and ask him to put an objection in*." This was a reference to Peter Ford, the Development and Compliance Director of Mercia Power.

72. At 16.49 on the same day, Mr Thompson emailed Mr Ford, copying Mr White, with a link to an article he had found on the internet, observing that it "*looks like planning permission hasn't been granted yet but just the demolition has been ok'd*". The link was to a news article in the Rotherham Business News (or "Rothbiz") dated 9 October 2023. It read as follows:

> ## News: Housing plan for Rotherham bus depot site
>
> **The site of a large vacant bus depot in Rotherham could be transformed into a new housing development, new outline plans show.**
>
> Rothbiz reported earlier this year that the owners of the former First bus depot on Midland Road had secured approval to be demolished. [This paragraph was hyperlinked to the earlier news article dated 24 May 2023.]
>
> …
>
> Prospect Estates Ltd, a UK focused real estate investment management company, has now submitted an outline application for 120 residential units on the 3.85 hectare site.

> Plans show that there will be two points of access formed from Midland Road and Union Street to serve the development.
>
> The plans, drawn up by Roger Lee Planning Ltd, state: "The application is submitted in outline with just the access sought for approval at this stage. All other matters are reserved although the indicative site layout shows a layout that would accommodate 120 residential units with a range of house and apartment types. …"

73. The article went on to recite further extracts from the submitted planning statement, and the fact that the application had been accompanied by evidence from commercial property agents showing that the site was no longer viable for business use.

74. Although Mr Thompson's observation that it looked like planning permission had not been granted yet was fully accurate, it was made in the context where it was entirely clear – indeed the article could not have been more explicit – that an outline planning application had been made. Further, the article had provided significant detail as to the basis of the application. Despite all of this, the only reference to the contents of the [unexhibited] article provided by Mr White in his witness statement (at paragraph 16) was that it "*referred to the prior approval of the demolition of the Development Site*". This is a strikingly incomplete summary of its contents. I was told by Mr Jones KC, on instructions, that that is all that Mr White had taken from the article at the time. It is not clear why that should be so. It is difficult to understand why anyone could have been left in any doubt as to the existence of a recent outline planning application, which represented a separate and new application to the demolition application that had been previously approved.

75. Further, it appears to me to have been somewhat lacking in thoroughness to seek to check the accuracy of the reports of a planning application published four months earlier (9 October 2023) by checking whether site notices were on display on site as at the time when the Claimant heard or read those reports (on 16 February 2024). It is not surprising that the Claimant found no site notices "*at that time*" (paragraph 14). In any event, if, as Mr White states, employees had visited the Facility on a regular basis, there is no reason why they could not have been alert to check the notices displayed on the lampposts around the Development Site, including on Union Street itself. If and to the extent that it was being suggested (at paragraph 15) that there had been no notices at all, that was incorrect.

76. It is not clear precisely when Mr Ford checked the Council's map search facility, other than that it was "*subsequently*" (paragraph 17). But whenever he did, he would have encountered the disclaimer on the website explaining that the map search facility was not guaranteed to be complete or accurate. While a convenient port of call, it was no substitute for checking the planning portal

itself, where the application could easily have been located. However, it appears that neither Mr Ford nor Mr Thompson ever looked there. Nor did they contact the Council at this stage to check whether the newspaper reports were accurate, notwithstanding the apparent omission on the map search facility.

77. Whilst it is said by Mr White at paragraph 18 that Mr Ford and Mr Thompson regularly reviewed local news for further details, no further details are given as to what they did, or how Mr Thompson "*found"* the BBC news website article on 11 June 2024. Nor is there any evidence from either Mr Ford or Mr Thompson as to the searches they made, or when they made them.

78. Although Mr White does not mention the fact in his witness statement, the [unexhibited] BBC news article that Mr Thompson found and emailed to Mr Ford on 11 June 2024 was in fact dated 29 February 2024. It appeared on the South Yorkshire area of the "Local News" section of the website. It was prominently headlined "*Rotherham: Plans approved for 120 homes on ex-bus depot site"*, and went on to report the grant of outline planning permission. Given that the article would no longer have been current news at the time Mr Thompson "*found"* this article (being well over 3 months old by that time), and so is unlikely to have been found by navigating to the Local News section of the BBC website, I infer that he used the simpler expedient of a search engine (Google or similar). However, there is no reason to believe that such an article would not have been similarly discoverable by means of a Google search at an earlier date. To the contrary, as Mr Lowe pointed out in his witness statement of 8 August 2024, a simple Google search for "Masbrough Bus Depot" yielded several links relevant to the application, including a link to the article in the Rotherham Advertiser dated 16 October 2023 to which he had referred, and moreover a link to the relevant page on the Defendant's planning portal which dealt with the application.

79. It therefore appears that the application would have been capable of discovery with minimal effort, had suitable searches been conducted at an earlier stage. Despite what is said at paragraphs 18-19 of Mr White's statement, there is no adequate evidence that any searches were conducted between 16 February 2024 and 11 June 2024. Had any such searches been conducted, they would have led to a link to the Planning Portal (which was itself available to be searched at any time), and after 29 February 2024 would additionally have led to the BBC News report of the grant of outline planning permission. That conclusion is supported by two further aspects of the evidence:

    i) When Mr Thompson emailed Mr Ford the link to the BBC News article on 11 June 2024 (with no supporting explanation beyond the email subject title "*Union Street outline planning permission for 120 houses*"), Mr Ford responded just sixteen minutes later, saying: "*You are correct, Outline Planning Permission has bene (sic) granted for the housing near Union Street"*, followed by the application number and a link to the Defendant's Planning Portal. He noted that the application still did not appear on the commercial "Searchland" service or on the Council's

planning mapping service, "*so that's how I had missed it previously.*" But it remains clear that the application was readily discoverable on the Defendant's Planning Portal itself, as Mr Ford was able to locate it very quickly indeed.

ii) Just half an hour after responding to Mr Thompson, Mr Ford then contacted the Council's Mr Lowe by email, raising concerns about the impact of the noise from the Facility on future residents, and asking to be kept informed of any further development on the old bus depot site. Notably, Mr Ford did not say that he had conducted regular reviews of the Council's map search facility, but instead said that "*I did also check the Councils planning search facility last year as we could see the other demolition application listed, but this outline application was not visible there. It is still not visible which is strange, is that because its Outline approval only perhaps?"* While Mr Ford was clearly wrong in remembering that his previous search had been the previous year (rather than on 16 February 2024), this is otherwise consistent with the conclusion that the Claimant had not in fact regularly reviewed either local news or the Council's map search facility since February.

80. The Council's failure to publish a notice in the local press in accordance with Article 15(4)(b) of the 2015 Order cannot lightly be dismissed. However, the Claimant cannot make any suggestion that it was this failure that meant that it did not become aware of the application when it was first made. Mr White made no suggestion that the Claimant had been actively reviewing local newspapers to look out for any planning applications which may affect it. One of the purposes of the publication of such notices, besides alerting the public directly, is to alert the local media as to the existence of any planning applications which they may choose to report upon. In this case, the local media was alert to report the application in any event, and did so in October 2023; but perhaps unsurprisingly given the absence of any evidence that the Claimant was monitoring local media to any degree at all, the Claimant was not alerted to the existence of the planning application by this means either. It is clear that had the Council published a notice in the local press, it would have made no difference to the time when the Claimant became aware of the application.

81. Notwithstanding that position, it is at least arguable that the legal significance of the Council's failure to fulfil its obligations in full under Article 15 of the 2015 Order is that the premise upon which the Court of Appeal held in *Gerber* and *Thornton Hall Hotel* that objectors cannot be heard to say that they "*happened to remain unaware*" of the application is not established in the present case. Even assuming that issue in the Claimant's favour, however, in my judgment it must be taken to be on notice of the application at the very latest from the time it discovered the article reporting that the outline planning application had been made, on 16 February 2024. There is no satisfactory explanation for the Claimant's failure to search for further details on the planning portal or even by means of a Google search until 11 June 2024. No

evidence has been provided either by Mr Thompson or by Mr Ford. The Claimant's reliance upon a commercial provider and upon the map search facility was at the Claimant's own risk. It could and should have done more in light of the clear explanation in the press article that (as at 9 October 2023) an outline application had been made and was being considered by the Council.

82. By 16 February 2024, therefore, the Claimant had had a fair opportunity to become aware of the proposed development, and could subsequently have objected to it. Although the application was due to be determined by the Council's Planning Committee only days later, they could have asked for consideration of the application to be deferred to a future meeting in light of the failure to advertise it properly, to allow them an opportunity to consider and respond to the application. (Had the Council refused to do so, that might in itself have given good grounds for the Claimant to have brought a judicial review claim at that point.) In any event, the Claimant was by this point bound to act with the greatest possible celerity.

(iii) Did the Claimant act promptly thereafter?

83. The Claimant did not act promptly or with the greatest possible celerity following 16 February 2024. As I have indicated above, it made no or no adequate enquiries following its discovery of the press report of 9 October 2023, and failed either to contact the Council, or to check the Planning Portal, or to monitor press reporting until 11 June 2024, despite being in possession of information which clearly explained the existence and basis of the application for outline planning permission on the Development Site.

84. I do accept that following 11 June 2024, the Claimant acted with some degree of celerity:

i) On 13 June 2024, the Claimant instructed solicitors. On 18 June 2024, the Claimant's solicitors wrote to the Council and to the Interested Party to put them on notice of an impending legal challenge to the grant of planning permission. Counsel were instructed.

ii) On 19 June 2024, the Claimant approached acoustic experts to review the NIA and consider whether its findings were robust. On 25 June 2024, the Claimant requested the Council to disclose correspondence sent to and from the EHO in connection with the application. That disclosure was provided by the Council on 28 June 2024.

iii) On 28 June 2024, the Claimant commissioned Mott McDonald Ltd to carry out a desktop review of the NIA. On 5 July 2024, Counsel's advice was provided. On 9 July 2024, Mott McDonald indicated to the Claimant that the conclusions in the NIA were not robust, and that a report would follow. The legal team was instructed to prepare the claim and grounds of challenge. On 10 July 2024, the Claimant notified the Council and the

Interested Party that the claim was being prepared and would be issued shortly.

iv) On 12 July 2024, Mott McDonald produced a short five page report setting out their findings, which criticised the NIA for having misinterpreted and misapplied relevant British Standards, for having inappropriately restricted their measurement of background sound levels to a location on the opposite side of the development to the Facility, and having failed to take measurements at weekends or at night. It further criticised the characterisation of the specific sound level at the proposed residential receptors, and the consideration of acoustic features of the noise emitted by the Facility when determining rating level and therefore impact on residential development. The report concluded that the NIA understated the impact of the Facility on the proposed residential development and criticised the proposed mitigation measures as inadequate or not sufficiently robust. As a result, it concluded that the NIA did not fulfil the "agent of change" principle set out in paragraph 193 of the NPPF, which states: "*Planning policies and decisions should ensure that new development can be integrated effectively with existing businesses and community facilities (such as places of worship, pubs, music venues and sports clubs). Existing businesses and facilities should not have unreasonable restrictions placed on them as a result of development permitted after they were established. Where the operation of an existing business or community facility could have a significant adverse effect on new development (including changes of use) in its vicinity, the applicant (or 'agent of change') should be required to provide suitable mitigation before the development has been completed."*

v) On 17 July 2024, the Claimant issued its claim for judicial review.

85. Had I accepted that the Claimant should not be taken to have had notice of the application until 11 June 2024, it would have been possible to conclude that the Claimant acted promptly thereafter. However, that is not the position. All of these actions ought to have been taken with a similar degree of celerity nearly four months earlier (at the very latest).

(iv) How strong is the Claimant's case for saying that the grant of outline permission was ultra vires?

86. The Defendant and the Interested Party conceded for the purposes of the extension application and permission application that the Claimant's grounds of challenge were at least arguable. Mr Jones submitted that they were strongly arguable and/or bound to succeed, and that this should weigh strongly in the balance in favour of granting the extension of time.

87. The fact that grounds of challenge may in any given case be well founded is never in itself conclusive of the question as to whether time should be extended

for the filing of the claim form. Indeed, in *Gerber* itself, there was no appeal against the conclusion of the judge at first instance that three of four grounds of challenge were well founded, and that the grant of planning permission had therefore been unlawful. The developer's appeal still succeeded, on the grounds that the judge had been wrong to extend time for the claim form to be filed. Nonetheless, as made clear at *Thornton Hill Hotel* at [21(4)], a strong case may still be relevant to the exercise of discretion.

88. In order to understand the Claimant's proposed grounds for review, it is necessary to set out the facts concerning the Council's consideration of the application for outline planning permission. I will then set out the Claimant's grounds and my broad assessment of their strength.

- *The relevant facts*

89. In support of the application for planning permission, the Interested Party had submitted a Noise Impact Assessment dated 15 September 2023 (**"the NIA"**). The NIA was submitted in light of the EHO's concern that had been expressed at the pre-application stage that there was a potential for noise disturbance to the future occupiers of the residential dwellings, including from the Facility. A noise survey had therefore been required to be provided, to assess the potential impact of noise from the various noise sources around the Development Site, the suitability for use as residential, and outline any necessary mitigation measures to achieve the necessary noise levels.

90. Although the application was for outline planning permission only, and all matters except access were reserved, the NIA proceeded on the basis of an assumed layout of the residential development to assess the impact of noise on future residents, and the adequacy of any mitigation measures which might be provided.

91. The NIA described the existing "soundscape" of the Development Site as being comprised of road traffic noise from vehicles using the surrounding road network, commercial noise associated with the Facility (which it described as the adjacent Back-up Electricity Facility or **"BEF"**) and people noise associated with a number of adjacent hot food takeaways and public houses. It noted that there was a continuous steady-state noise generated by table-top coolers at the Facility. However, it only assessed the impact of that noise between the hours of 07:00 and 22:00 daily, under the erroneous belief that the Facility could only operate between those hours. For that reason, night-time noise levels within bedrooms were not considered. So far as day-time levels of noise were concerned, the assessment indicated a number of garden areas would have exceedances of the typical background sound level, with the result that acoustic fences were proposed to mitigate this impact in respect of three specific plots. Further, it was found that the rated level of noise within the closest living rooms on the eastern façade of an intended apartment block would exceed the noise criteria when the windows were open. Ventilation proposals were made on a plot-by-plot basis to mitigate this impact.

92. The EHO was satisfied with the report. By letter dated 9 October 2023 in response to the consultation over the application, he recommended that conditions be imposed on any grant of planning permission, in order to safeguard the amenities of the occupiers of the proposed development in accordance with the development plan and the NPPF. Those conditions were to require that:

    i) any future detailed application must demonstrate that "*all installed glazing and ventilation shall meet the minimum noise reduction criteria for each plot as specified in Section 5 and Appendix 3, Appendix 7, Appendix 8 and Appendix 11 of* [the NIA]"; and

    ii) any future detailed application must demonstrate that "*Acoustic barriers shall be installed to the boundaries of properties at the height and locations specified in Section 5 and Appendix 6 and Appendix 10 of* [the NIA]."

93. Mr Lowe was Principal Planning Officer in respect of the application. In his Officer Report, he recommended that outline planning permission be granted subject to conditions and to the completion of a satisfactory section 106 agreement. Amongst many other matters, the Officer Report:

    i) explained that only the principle of development and access was being formally considered at that stage;

    ii) noted that the "indicative" development layout showed a mix of house types and sizes, including 2, 3 and 4 bedroom houses and 1 and 2 bedroom apartments;

    iii) referred to the NIA and its conclusions (which were implicitly accepted), and advised that in view of the noise mitigation measures including the installation of appropriate glazing, ventilation and acoustic barriers, noise should not be deemed to be a determining factor in the granting of planning permission for the Development Site. It observed that the EHO had not raised any specific concerns to the principle of a residential development in this location, "*subject to the final details which can be considered in a reserved matters application*."

    iv) noted that the site was allocated for Business Use in the Local Plan, and assessed whether residential development would nonetheless be appropriate in this location in accordance with the relevant policies of the development plan; it concluded that a residential proposal on this site was acceptable. Although there was currently no shortage in the supply of housing land to meet local needs in the Borough, the site met the criteria in the Local Plan for development as a windfall site. There had been many years of vacancy and the Interested Party had submitted full supporting justification for the loss of the site for business purposes.

94. Under the heading of "Publicity", the Officer Report noted that the application had been advertised by way of site notices around the boundaries of the site along with individual neighbour notification letters to adjacent properties. It recorded three neighbour representations which had been received objecting to the proposal.

95. On 22 February 2024, the Defendant granted outline planning permission for "*residential development comprising up to 120 units including details of means of access*" at the Development Site, subject to conditions. The conditions included that application for approval of reserved matters must be made within three years of the date of the permission, in the normal way. They also included (as Conditions 32 and 33) the two conditions recommended by the EHO to provide mitigation in respect of the anticipated noise impact from (inter alia) the Facility, by way of glazing and ventilation (to protect certain identified plots' living rooms), and acoustic barriers (to protect certain identified plots' gardens).

- *The grounds*

96. The grounds for review which the Claimant advances may be summarised as follows.

i) Ground 1: The Council failed to consult the Claimant on the planning application. Given the circumstances of this case, the failure to consult the Claimant was conspicuously unfair; the officer's report materially misled members as to the nature of the consultation that had been carried out; and the reason given for not consulting the Claimant was irrational.

ii) Ground 2: The Noise Impact Assessment, and the Council's reliance upon it, was based upon a mistake of fact; namely, the erroneous statement that the Facility can only operate between 07:00 – 22:00, when there are no restrictions on the operation of the Facility during the night. As a result, no assessment was carried out of any potential adverse impacts that would be caused by operation of the Facility at night.

iii) Ground 3: There was an inconsistent approach to the imposition of conditions on an outline planning permission which effectively fix the layout of the Development by requiring acoustic mitigation to be provided by reference to detailed plots and elevations, contrary to advice provided to members that layout was not being determined and therefore a number of issues could be addressed through the reserved matters application, which was therefore materially misleading.

iv) Ground 4: The officer's report materially misled members by relying upon a noise impact assessment that was obviously flawed, and therefore failing to consider adverse impacts and policy conflicts that were likely to arise as a result of the Development.

- *Ground 1*

97. I do not regard Ground 1, as originally drafted, as strongly arguable. The Council was under no obligation to individually notify the Claimant of the planning application; nor was it conspicuously unfair not to do so: there was nothing to prevent the Claimant from submitting an objection in the ordinary way. The fact that it did not notice the site notices, including the one posted on Union Street itself, nor monitor the local press for reports of development despite the demolition work that was taking place on the Development Site in respect of the old bus depot (pursuant to the previously obtained demolition consent), was its own responsibility. There was nothing exceptional about this case that required the Council to individually notify the Claimant as a matter of fairness.

98. The Claimant seeks to generate such an obligation from a combination of circumstances, including that the Development Site had been allocated in the Local Plan for business uses, the fact that the EHO had required an assessment of significant noise sources including the Facility, and that the NIA contained a number of errors as identified by Mott Macdonald. These are all matters which could properly have been the subject of a properly timed objection to the planning application. However, none of these points generate a duty to consult by way of individual notification.

99. In the alternative, the Claimant submits that the Planning Committee was significantly misled by the officer's statement that "*the application had been advertised by site notices around the boundaries of the site along with individual neighbour notification letters to adjacent properties*": it contends that this implicitly suggested that the Facility's owners had been individually consulted and had no objection to the development. The ground is arguable, but is not especially strong: the officer was right to report the advertisement of the application by site notices, which was, taken alone, sufficient for the purposes of Article 15(4)(a) of the 2015 Order, without the need for further individual notification. The officer made no direct claim that every single adjoining property had also been individually notified.

100. In the further alternative under Ground 1, the Claimant submits that it was irrational for the Council not to have sent individual notification to the Claimant, despite sending such notifications to the properties to the north and south of it. I do not accept that this was necessarily irrational: the Council has explained that it did not hold an address for the property on the database used by the planning department. It does not follow from the fact that there may be a record of an address held for business rates purposes that the planning department is entitled to access those records for other purposes.

101. Taken together, the points in Ground 1 do not seem to me to be strong, Rather, they amount to an attempt to place the blame on the Council for the fact that the Claimant was not itself diligent in monitoring nearby developments, or accessing the records that the Council held on its planning portal or other media

reports in circumstances where it would have been straightforward for it to have done so.

102. Nor does the contemplated amendment to Ground 1 take matters further. I have already considered the significance of the Council's failure to publish notice of the application at paragraphs 80 - 82 above.

- *Ground 2*

103. It appears to me to be strongly arguable that the NIA proceeded upon a mistake of fact, in that it proceeded upon an incorrect assumption that the Facility did not operate outside the hours of 07:00 - 22:00 daily, and so did not assess night-time noise levels within bedrooms. It drew this information from the NIA which had been submitted in support of the application for planning permission for the Facility ("**the Facility NIA"**), which indicated that those would be the Facility's normal working hours. However, no condition was imposed limiting the Facility to those working hours, and the evidence is that while it does not typically operate throughout the night, it does routinely operate before 7:00 AM (generally between 6:00 AM and 7:00 AM).

104. Applying the test in *E v SSHD* [2004] EWCA Civ 49 at [66]:

i) It is strongly arguable that there was a mistake as to existing fact in the NIA, as to its actual operating hours.

ii) The Facility's actual operating hours are uncontentious and would have been objectively verifiable.

iii) Although the Claimant could have corrected this error if it had responded to the planning application on a timely basis, it is strongly arguable that it was not itself responsible for the error.

iv) It is less clear that the mistake played a material part in the Council's decision to grant outline planning permission. However, it is strongly arguable that (as the Claimant submits) consideration of nighttime noise levels would have led to consideration being given to whether further mitigation should be provided against the potential adverse effects caused by operation of the Facility between 06:00 and 07:00 (and potentially at other times of night, although there is little evidence that there is a material risk of that).

105. Nonetheless, given that layout is a reserved matter, there remains the opportunity for the Council to consider the need for mitigation measures in future. I return to the significance of that issue under Ground 3 below.

- *Ground 3*

106. It appears to me to be strongly arguable that Conditions 32 and 33, imposed on the grant of outline planning permission to protect the amenity of future

occupiers of the housing, inappropriately seek to tie the noise mitigation measures to a layout which was expressly to be dealt with as a reserved matter, and was not the subject matter of any consideration or approval by the Council. The layout provided for the purposes of the NIA was expressly intended to be illustrative, and the Officer Report recognised that (apart from access) the critical issue was the principle of residential development for 120 new dwellings was in issue, with final details to be considered in a reserved matters application: he advised members that "*The detailed layouts are not being considered in this proposal."*

107. As it appears to me, the EHO's report that recommended the imposition of these conditions did not fully recognise that this would be a matter for the reserved matters stage. Although the EHO was right to make clear that mitigation measures would in due course be required, there was no reason in principle why such measures could not have been designed as part of the submission of the layout details which would be the subject of a reserved matters application.

108. The Council will need to confront this problem when it considers the submission of the reserved matters application for approval of the layout. If and to the extent that the ultimate layout submitted by the applicant in an application for approval of reserved matters differs from that which is set out in the NIA and its Appendices to which Conditions 32 and 33 refer, it may be that it will also have to apply under section 73 of the Town and Country Planning Act for a variation of those conditions. Any such application would have to be properly supported by a new NIA which reflected the layout which is the subject of the application for reserved matters approval, and identify suitable mitigation measures as required.

109. There is no reason in principle why any such application could not cure the difficulties identified by the Claimant under Grounds 2 and 3. I do not regard the fact that these grounds may be strongly arguable as carrying significant weight in the assessment of the application to extend time to file the judicial review claim form, therefore: they do not appear to me to identify insuperable difficulties with the grant of outline planning permission which suggest that the public interest is best reflected by extending time.

- *Ground 4*

110. Ground 4 attempts to establish a public law error in the Council's consideration of the NIA, by reference to the conclusions of the Mott Macdonald report. The obvious difficulty with this ground is that the Mott Macdonald report was not before the Council. The Claimant seeks to overcome this difficulty by asserting that the conclusions of the NIA were "*obviously*" flawed, and that the Officer Report "*significantly misled"* members over the likelihood of adverse effects occurring and the extent to which they would be avoided by the mitigation which had been secured.

111. However, the flaws were not "*obvious*", but were identified only by reference to an expert report, for whose admission into evidence the Claimant also applies. The Council's EHO was satisfied as to the adequacy of the mitigation identified, and this was duly reported to members. The Officer Report did not "*significantly mislead*" members as to any established, uncontentious fact.

112. As with Ground 3, it may well be that upon consideration of reserved matters including layout, the Council will wish to be satisfied as to the adequacy of mitigation measures for the scheme in its fully detailed form. It may be that some of the points now raised in the Mott Macdonald report will inform its consideration of the impact of the Facility on the dwellings in their final layout, and that consequently variations will need to be made to the existing Conditions 32 and/or 33.

113. For present purposes, however, it suffices to say that whilst Ground 4 may be arguable, it is not so strongly arguable as to weigh heavily in the balance when considering the application to extend time.

(v) What degree of prejudice to third parties and/or detriment to good administration will be caused if time is extended for the claim form to be filed?

114. A witness statement dated 7 August 2024 was provided on behalf of the Interested Party by Mr John Lund, one of its directors. He explains that the Interested Party purchased the site on 31 May 2023 for £1.5 million plus VAT, and incurred £80,000 costs and stamp duty. From the summer of 2023, it proceeded to have the unoccupied bus depot buildings stripped of asbestos and other material, before having them demolished, at a cost of £200,000. The demolition was not completed until June 2024. Simultaneously, the Interested Party sought outline planning permission for residential development of the site, expending £76,000 in support of the application. The application was made in September 2023, and was granted on 22 February 2024. On 31 May 2024 terms of sale were agreed, subject to contract, between the Interested Party and Gleeson Regeneration Limited ("Gleeson") for the sale of the site with planning permission for £3.2 million. This was nearly 14 weeks after the grant of outline planning permission. The heads of term provided that the parties would use reasonable endeavours to complete the sale within 4-6 weeks. Contracts were expected to be exchanged and completion effected on 26 July 2024. As a result of the present challenge, however, the proposed sale to Gleeson was on hold. Mr Lund states that the longer the sale is on hold, the greater the prejudice to the Interested Party, in that it:

    i) will be deprived of prompt receipt of the £3.2 million sale price on which the Interested Party could be earning interest (it did not borrow to make the purchase);

    ii) will be deprived of the prompt recoupment of the costs relating to the site which it has incurred;

iii) faces the increased possibility that Gleeson would pull out of the proposed sale or seek to renegotiate the terms thereof to the disadvantage of the Interested Party; and

iv) will incur additional and unnecessary professional and other costs.

115. In response, the Claimant submits that this shows that the Interested Party proceeded to purchase the site and commence demolition and site clearance prior to the grant of planning permission, with the result that no detrimental reliance was placed on the receipt of planning permission and the expiry of the 6-week challenge period to take these steps. It had proceeded at its own risk. It would have incurred the time and costs spent applying for and obtaining outline planning permission in any event. The delay arises from the fact that the challenge has been brought, not from the delay in bringing the claim. Had the claim been brought on time, the sale would not have been agreed at all. It had been put on notice of that challenge on 18 June 2024 in any event. The Claimant also stresses that the planning permission was in outline only, and that further consents for the reserved matters are necessary before work can commence on site.

116. In my judgment, the Claimant's submissions substantially understate the true prejudice to the Interested Party, and ignore the detriment to good administration which is caused by the late challenge. Following the elapse of six weeks after the grant of planning permission (i.e. by 4 April 2024), the Interested Party was entitled to assume that there was to be no challenge to the planning permission. It proceeded to negotiate the heads of terms, which were agreed on 31 May 2024 – still before the Claimant had even taken action to search for the planning permission, following its initial action on 16 February 2024. It entered into those heads of terms in the expectation that it would be able to complete the sale within weeks. It is to its substantial detriment that it has not been able to do so.

117. While it is true that the planning permission is outline and not a full permission, reliance may still be placed upon the principle of development having been accepted. It is that acceptance which generated the additional value in the site. The fact that the spade will not be ready to go into the ground until reserved matters are approved does not remove the detriment to the Interested Party, who did not propose to develop the site itself. The fact that the claim was not brought until just short of five months after the grant of planning permission – a very substantial delay beyond the six week period provided for by CPR 54.5 – in and of itself gives rise to detriment to good administration and unfair prejudice to the Interested Party (and potentially to Gleeson as well), as recognised in both *Gerber* and *Thornton Hall Hotel*. Further, if I were to extend time, both the Council and the Interested Party would be deprived of an accrued limitation defence, and would cause further delay and uncertainty as to the ultimate outcome of the planning application. It is no answer to say that such uncertainty would have been caused if the claim had been brought in time: the point is that the Claimant's failure to bring the claim at the appropriate time but nearly five

months after the grant of permission has substantially and prejudicially extended the time for which such uncertainty would persist.

(vi) Are there any other relevant circumstances which should be weighed in the balance, including the other matters raised in support of the Claimant's application?

118. The Claimant makes four additional points in support of its application.

119. First, the Claimant emphasises that the development has the potential to affect the operation of its existing business, located within an area identified for business uses. It is said that the business makes an important contribution to the provision of energy and meeting National Grid's requirements for additional energy at times of high demand. I do not attach significant weight to this consideration: this was the reason why it was incumbent upon the Claimant to act promptly following 16 February 2024 (at the latest). It does not justify an extension of time in circumstances where the Claimant itself did not act with all possible celerity.

120. Secondly, it is also said by the Claimant that the development could jeopardise any future plans to convert the Facility for use for battery storage, given that there is said to be an accompanying risk of fire. This point is speculative at best. There are no such plans at present, and even if there were, it would simply emphasise the need for the Claimant to have acted quickly to have protected its potential future plans, and not provide justification for an extension of time to make up for its own delay.

121. Thirdly, it is also said that the development is a windfall site, and that the Council had concluded that there was currently no shortage of housing land to meet local needs in the Borough, and no need to approve residential development on land allocated for other uses. However, that point ignores the evidence as to the lack of any need for the site for business uses, and its long history of standing empty and disused prior to the present application. The Council found that it fulfilled the requirements of the Local Plan for residential development to be permitted upon it, notwithstanding the windfall nature of the site. None of this provides any reason to extend time.

122. Finally, I note also the arguments made on paper as to the need to comply with the Aarhus Convention and Articles 6 and 14 of, and Article 1 of the First Protocol to, the ECHR. Neither point was pressed by Mr Jones. There is nothing in either point:

    i) There is no arguable conflict with the Aarhus Convention by virtue of there being a requirement to bring a challenge within six weeks. The grant of planning permission was a matter of public record, and discoverable by the Claimant at any time after its grant on the Planning Portal. It further became known to the public when the grant of planning permission was publicised in the media, including on BBC News on 29

February 2024. Nothing in the Aarhus Convention requires an extension of time of 15 weeks.

ii) Nor is there any arguable claim that a refusal to extend time is in breach of the ECHR. There is nothing in the ECHR which required individual notification of the Claimant, or which mandates an extension to the limitation period.

Overall conclusion

123. I have balanced all of these factors in the light of the principles set out in *Thornton Hall Hotel*. I conclude that I should not extend time for filing the claim form. The Claimant failed to act with all possible celerity, and instead delayed its enquiries following receipt of information that the application had been made (but not yet determined) on 16 February 2024. To extend time would cause substantial and unfair prejudice to the Interested Party and detriment to good administration. The grounds of the challenge are not so strong as to mean that the public interest in the claim being heard and/or in decisions as to planning permission being made on a lawful basis outweighs these matters. There is no good or sufficient reason to extend time to make up for the Claimant's delay.

124. The Claimant's application for an extension of time to file the claim form is accordingly dismissed.

The application for permission

125. Since the claim form was not filed within the required time in breach of CPR 54.5(5), and in light of my refusal to extend time, permission to apply for judicial review must also be refused.

Summary of conclusions

126. For the reasons I have set out above:

i) The Part 11 Applications made by the Defendant and the Interested Party are dismissed.

ii) The applications made by the Defendant and the Interested Party to extend time for the filing of their summary grounds of defence are granted, but the costs associated with the preparation of those summary grounds are to be disallowed.

iii) The application made by the Claimant for an extension of time to file the judicial review claim form is dismissed.

iv) Permission to apply for judicial review is refused.

127. I am grateful to all counsel and solicitors for their assistance.